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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1500

GENERAL ELECTRIC COMPANY - - Petitioner

versus

LOCAL 783, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO - - - Respondent

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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May 7, 1973

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

GENERAL ELECTRIC COMPANY, - - *Petitioner,*

v.

LOCAL 783, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, General Electric Company, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on January 5, 1973.

OPINION BELOW

The opinion of the Court of Appeals, 471 F. 2d 751, and the Order denying rehearing (not reported), appear in the Appendix hereto at pages 48 through 60. The Findings of Fact and Conclusions of Law rendered by the District Court for the Western District of Kentucky (not reported), appear in the Appendix at pages 29 through 46.

JURISDICTION

The date of the judgment in the Court of Appeals for the Sixth Circuit and the date of its entry was January 5, 1973. A timely petition for rehearing *en banc* was denied on February 7, 1973, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the parol evidence rule rendered inadmissible evidence of past practice and of agreements made during bargaining sessions that the establishment of the Singapore facility did not violate the collective bargaining agreement?

2. Was it error to hold that establishment of the Singapore facility violated the only plain meaning of the collective bargaining agreement, thereby excluding from consideration the existing circumstances, bargaining history, past practice and usage as evidence of another meaning?

3. Was the Sixth Circuit's denial of a petition for a writ of mandamus to compel trial before a jury a holding on the merits and thus binding on that Court when the action was appealed after trial?

STATUTORY PROVISIONS INVOLVED

§ 301(a), Labor Management Relations Act, 61 Stat. 156 (1947), Title 29, U.S.C.:

> "§ 185. Suits by and against labor organizations—Venue, amount and citizenship
>
> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

General Electric Company established a plant in the Republic of Singapore for the manufacture of parts of radio and television receiving tubes. The Union brought this action under § 301 of the Labor Management Relations Act claiming that the Singapore operation breached the "farming out" clause of the collective bargaining agreement between Local 783 and General Electric relating to its Owensboro, Kentucky operations.

General Electric manufactures radio and television receiving tubes in Owensboro, Kentucky. In 1970 it established the Singapore facility to make parts for some of these tubes. The Company built and is op-

erating the Singapore plant in order to retain its market for tubes by meeting offshore competition (which has driven 7 U. S. receiving tube manufacturers out of business) and to preserve jobs for its Owensboro employees. The Union contends that this was a violation of Article XVI § 5 of the collective bargaining agreement, which provides:

> "There shall be no farming or letting out or transfer of machinery or work for the purpose of curtailing or reducing employment in the plant."

The contract excludes disputes under this clause from arbitration.

The "farming out" clause has appeared in every agreement between the parties since their first contract in 1945. Shortly before the 1945 contract, General Electric had bought the Owensboro works from Ken-Rad Lamp Company. The immediately preceding contract between Ken-Rad and the Union had a different clause providing:

> "4. The Company agrees that it will not farm out any of its work to any other plant or plants for the purpose of curtailing or reducing employment in its plants covered by this contract."

In the years since 1945, General Electric had moved production from its Owensboro plants to its plants in other areas, and from plants in other areas to its Owensboro plants without a grievance ever having been made that this violated the "farming out" clause.

In the early months of 1970, the parties were engaged in contract negotiations. At the bargaining session of January 20, the Union representatives and company representative, McQueeney, discussed the meaning and application of the "farming out" clause to moves in and out of Owensboro as developed during 25 years of practice in the following colloquy:

"C.
(McQueeney) Suppose a new business was thinking of coming in here and we told them of the good work climate and people, and then told them that if they were to move equipment in they should know they could never move it out to another of their locations. He'd ask how many other GE locations have the problem and we'd say none. He'd say goodbye.
U.
(Dugger) That gets away from farmout. Besides that's not farmout in GE.
C.
(McQueeney) Can you see how unattractive we could be to a new business? Our current language says we can't farm out for the purpose of curtailing or reducing the workforce. Your proposal seems to say that we couldn't move the equipment to Springfield.
U.
(Harrison) Even under our language you'd be breaking the agreement when you sent stuff to Springfield since it would reduce some work here, if we meant farmout to include within GE moves. We don't mean that.
U.

(Arnold) There's quite a difference between farming out and transferring work between locations. We haven't made a stink about that.
U.
(Warren) Look at your thick film move to Syracuse. We didn't complain about that either.
U.
(Erwin) We're aware of the changing realities of a business which says some things come in here from other GE locations and go out to other GE plants. What we want to do away with is farming work out to Faith Tool & Die, or a place like "Knuckles" when we've got equipment and people in here who can do the work, and we think cheaper too. We do enough rework at EDC on farmed out stuff to offset the cost of doing it here to begin with, to specifications without rework.
C.
(McQueeney) I'm just not aware of the fact that this does, in fact, go on.
U.
(Erwin) Well, it does, and that's what we don't like. We've never complained about transferring stuff to other GE locations. We sent those base staking machines to Tell City and they sent the bases back here for processing for sometime before the machines were finally returned here. We didn't cry about that, because that's not farm-out."

On January 21, the company newspaper formally announced to the employees that the Singapore operation would be started later that year.

The meaning of Article XVI § 5 was again discussed and agreed upon at the session of February 3.

"C.

(McQueeney) Let's take up where we left off at our last meeting. I believe it was on:

Article XVI—Section 5—Farming Out

It must be pretty evident after our last discussion just how important our concern is for this language. Facing the continuing decline of the core business we want to be able to attract other businesses to take its place. There are two ways we go about getting new employment opportunities in to Owensboro. First, we continually look for ways to add new product innovations within the Tube Department such as we did when such things as DDO and Microwave Products were added. A second effort we make is to search for new departments to move into Owensboro such as the one we announced recently in the Headliner. Of course, this contract and therefore this farmout language would not affect a new product department such as the one announced, but the very existence of this clause does nothing to enhance the attractiveness of the Owensboro location. Even decisions to add to the Tube Department must involve review and concern for the current farmout provision; that is why I explored so thoroughly with you your interpretation of the current farmout language. First, let me say that we are not willing to revise the current language as you propose; we are simply unwilling to broaden the current spirit and intent of this language. Second, personally I am not happy with even the current language but considering the arbitration rulings which give it definition[1] and considering your interpretation that

[1]This clause has not been arbitrable since the 1966 agreement.

this language in no way, shape or form applies to the transfer of work or equipment from Owensboro to anyplace within the General Electric Company, on that basis, I'm willing to keep the language we have in the agreement. Have I correctly stated at least that part of your interpretation of this language correctly that is, that the language in no way applies to the transfer of work or equipment from Owensboro to any other location in the General Electric Company?

U.

(Arnold) That's right.

U.

(Erwin) I agree."

The District Court admitted in evidence this settled practice of 25 years and the quoted agreement of the parties as to the meaning of the farmout clause. The Court of Appeals held this reversible error.

It was against the background of the commitments quoted above that the collective bargaining agreement was executed on March 3.

Although the announcement was made on January 21 and the first shipment of equipment to Singapore was on March 5, this action was not filed until November 5, 1970.

The Complaint brought in the state court prayed only for injunctive relief. General Electric removed to the United States District Court for the Western District of Kentucky, invoking that Court's jurisdiction under Section 301 of the Labor Management Relations Act of 1947. The District Court, after a hearing held on November 10, 1970, dissolved the state

court's temporary restraining order and denied a temporary injunction.

There was no further action until the District Court on June 16, 1971, ordered that a pre-trial conference be held on August 19. The pre-trial conference order set the case down for trial before the Court on September 16. On September 8, Respondent filed a Motion for Leave to Amend its Complaint to include (1) a prayer for damages of over $4 million, and (2) a demand for jury trial.

The District Court granted leave to amend on condition that the action proceed to trial without a jury. It also granted Respondent additional time to file a brief on its claim of right to a jury and reset the trial to November 10. After briefing, the Court again declined to allow a jury trial.

On October 26, Local 783 brought an original mandamus action in the Court of Appeals against the District Judge and General Electric to compel the Judge to grant a jury trial. General Electric objected to the mandamus petition, arguing to the merits that the District Court had not exceeded its discretion in placing a condition on the granting of leave to amend. It also argued that the extraordinary writ of mandamus was not appropriate in this case. The Court of Appeals denied mandamus in an opinion directed only to the merits rather than to the inappropriateness of the remedy. See page 27 of Appendix hereto.

Local 783 then sought a stay of the trial on the grounds that it was preparing a petition for certiorari to review the denial of mandamus. The stay was

denied by the District Court, by the Court of Appeals for the Sixth Circuit, and by Circuit Justice Potter Stewart. Local 783 did not seek review by certiorari.

The case then went to trial. The District Court held evidence of practice, usage and bargaining history was admissible and found that the parties did not intend the "farming out" clause to prohibit transfers to other GE plants. It further found that General Electric did not establish the Singapore operation "for the purpose of reducing employment," but that the purpose of establishing the plant was to preserve Owensboro jobs that would otherwise be lost to offshore competition.

The Court of Appeals reversed the judgment rendered by the District Court on the grounds that its denial of mandamus did not decide the jury issue on the merits, and that it was error to grant leave to amend on the condition that the trial be by the Court. It reversed on the additional grounds that the "farming out" clause had but one plain meaning, and that it was error to admit evidence for the purpose of interpreting the collective bargaining agreement.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to Application of the Parol Evidence Rule to Collective Bargaining Agreements.

This case involves conflicts between the Fifth and Sixth Circuits as against the Seventh and Ninth Circuits involving an important phase of administration of the national labor laws, i.e., whether parol evidence

may be used to construe collective bargaining agreements.

This Court has held that a collective bargaining agreement is "more than a contract; it is a generalized code to cover a myriad of cases which the draftsman cannot wholly anticipate." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 at 578 (1960).

In holding that the parol evidence rule applies to collective bargaining agreements to prohibit the admissibility of the bargaining session statements, past practices and usages, the Sixth Circuit relied upon the following decisions of other Courts of Appeals: *N.L.R.B.* v. *Gulf Atlantic Warehouse Co.*, 291 F. 2d 475 (5th Cir. 1961); *Anson* v. *Hiram Walker & Sons, Inc.*, 222 F. 2d 100 (7th Cir. 1955) cert. denied 350 U. S. 840 (1955), rehearing denied 248 F. 2d 380 (7th Cir. 1957); *International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *General Electric Co.*, 332 F. 2d 485 (2nd Cir. 1964), cert. denied 379 U. S. 928 (1964).

Only the Fifth Circuit decision in *N.L.R.B.* v. *Gulf Atlantic Warehouse, supra,* supports the Court below. *Anson* v. *Hiram Walker & Sons, Inc., supra* (7th Cir. 1955), was decided before this Court distinguished collective bargaining agreements from other contracts in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co., supra,* and it is no longer the law even in the Seventh Circuit. See cases cited at p. 13 below.

In the Second Circuit case, *International Union of Electrical, Radio and Machine Workers, AFL-CIO* v.

General Electric Co., supra, the Court did not hold that the parol evidence rule applies to collective bargaining agreements; it simply held that a court will not consider bargaining history where it touches upon both the questions of arbitrability and the merits of a dispute. Resolution of such factual issues is for the arbitrator rather than the court. This rule, designed to strengthen the arbitration process, has no application where the parties have excluded a dispute from arbitration as they have here.

The Court below relied on *Warrior & Gulf* as holding that evidence of bargaining history was not to be used in determining the meaning of an arbitration clause, and the Court interpreted this to mean that parol evidence is admissible only *"when the contract is in need of interpretation."* This was the same error the Fifth Circuit had made in *N.L.R.B.* v. *Gulf Atlantic Warehouse.*

Both Circuits erred in finding that this Court had applied the parol evidence rule in the *Warrior & Gulf* case. *Warrior & Gulf* did not apply the parol evidence rule. Instead, it announced a rule as to the *weight* of evidence necessary to find an intent to exclude an issue from arbitration. In order to further the federal policy favoring arbitration, *Warrior & Gulf* held that "doubts should be resolved in favor of arbitration" and "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." This rule for construction of arbitration clauses is entirely different from those for other clauses of collective bargaining contracts. The *Warrior & Gulf* opinion

recognized that once a tribunal reaches the merits of an issue, it is not bound by common law rules, by noting that the words of a collective bargaining agreement cannot be the "exclusive source of rights and duties", and that the "common law of the shop" furnishes context to the agreement. 363 U. S. at 579, 580.

Decisions of the Ninth and Seventh Circuits conflict with the Sixth Circuit's decision in this case and the Fifth Circuit's in *Gulf Atlantic Warehouse*. In *Forrest Industries, Inc.* v. *Local U. No. 3-436, Int. Woodworkers,* 381 F. 2d 144 (9th Cir. 1967) evidence of past practices was considered on the basis of this Court's view of the special nature of collective bargaining agreements as expressed in *Warrior & Gulf*. Also, the Ninth Circuit's earlier decision in *Pacific Northwest Bell Tel. Co.* v. *Communications Wkrs. of A.,* 310 F. 2d 244 (9th Cir. 1962) and the Seventh Circuit decision of *Independent Petroleum Workers* v. *American Oil Co.,* 324 F. 2d 903 (7th Cir. 1963), aff'd Per Curiam by eq div ct. 379 U. S. 130 (1964), rehearing denied 379 U. S. 985 (1965); *General Teamsters, Chauffeurs & Helpers U.* v. *Blue Cab Co.,* 353 F. 2d 687 (7th Cir. 1965); and *Local U. No. 483 Int. Bro. of Boilermakers, etc.* v. *Shell Oil Co.,* 369 F. 2d 526 (7th Cir. 1966) hold that bargaining history, past practices and usage may be considered in interpreting this special class of agreements.

These conflicting decisions justify the grant of certiorari to review the judgment of the Sixth Circuit.

2. The Decision Below Conflicts in Principle With Applicable Decisions of This Court Which Hold That Collective Bargaining Agreements Are Not Governed By Common Law Contract Rules.

This Court has held that "[a] collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts." *T.-C.E. Union* v. *Union Pacific R. Co.*, 385 U. S. 157 at 160-161 (1966), rehearing denied 385 U. S. 1032. And the Second Circuit has followed this rule that collective bargaining agreements are not to be forced into the molds of strict common-law contract principles. *Columbia Broad. Sys. Inc.* v. *American Record. & Broad. Ass'n.*, 414 F. 2d 1326 (2d Cir. 1969).

Further, this Court has specifically recognized that past practices and usage are to be considered in construing collective bargaining agreements. It considered such evidence in *Drake Bakeries* v. *Local 50*, 370 U. S. 254 at 259 (1962) and it reiterated this view in *T.-C.E. Union* v. *Union Pacific R. Co., supra:*

> "In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." 385 U. S. at 161.

These conflicts with the decisions of this Court justify the grant of certiorari in this case.

3. The Decision Below Raises Significant Questions as to What Evidence May Be Considered in Interpreting Collective Bargaining Agreements.

The federal policy to be considered in formulating substantive law under § 301 is to promote industrial peace through the collective bargaining agreement. *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 578 (1960). While forcing parties to "dot every i and cross every t" may be called for in some contractual situations, it is inappropriate where the alternative to failure to agree is the strike. Application of the parol evidence rule to collective bargaining agreements would cause both companies and unions to demand such great detail while negotiating as to make it likely that neither could agree to the other's demands. Parties to collective bargaining agreements are loath to agree to change long-accepted language for fear of consequences which they are unable to predict. In either event, the federal policy of promoting industrial peace would be frustrated.

Parties to collective bargaining agreements should be permitted to show the meaning they have given to the words by their common understandings, usages and past practices. The use of words to express a complicated understanding is a venture fraught with imperfection and risk in any situation and the likelihood of imperfection is even greater in the drafting of collective bargaining agreements.

> "Issues are often settled by a general formula because the negotiators recognize they could not possibly foresee or provide for the many con-

tingencies which are bound to occur during the life of the agreement. Indeed, any attempt to anticipate and dispose of problems before they arise would, I suspect, create new areas of disagreement and thus obstruct negotiations. Sooner or later the employer and the union must reach agreement if they wish to avoid the economic waste of a strike or lockout. Because of this pressure, the parties often defer the resolution of their differences—either by ignoring them or by writing a provision which is so vague and uncertain as to leave the underlying issue open." Mittenthat, *Past Practices in the Administration of Collective Bargaining Agreements,* 59 MICH. L. REV. 1017 at 1022-23 (1961).

Our Kentucky Court has affirmed this only recently:

"Actually, it is difficult in any case to say with assurance that only one interpretation of a contract provision is possible. In ordinary commercial contracts, skilled lawyers have difficulty in stating the terms in such precise language that all ambiguity is eliminated." *United Brick & C. Wkrs., Loc. 486* v. *Lee Clay Pr. Co., Inc.,* Ky., 488 S. W. 2d 331 at 335 (1972).

In the case at bar, proof was offered of practices of 25 years standing. In addition, the bargaining history evidenced the Union's agreement to the historic meaning of the "farming out" clause, and it also explicitly confirmed and admitted the existence of the past practices. The Fifth Circuit considered such evidence in *Watson* v. *International Bro. of T., C., W. & H. of America,* 399 F. 2d 875 (5th Cir. 1968).

Past practices and usages are perhaps the most valuable tools in arriving at the true intent and purpose of collective bargaining agreements and should in fact be considered a part of the agreement:

> "The collective agreement by which the individual and the collective parties are governed is not limited to the four corners of the written instrument. It is the whole agreement, including the industrial customs, established practices, understandings and precedents which infuse the contractual words with life and meaning." Summers, *Individual Rights and Arbitration,* 37 N.Y.U.L. Rev. 362, 396 (1962).

Past practice is of such significance that one writer has suggested there should be a presumption that a practice continues in force unless repudiated during negotiations.

> "Because the contract is executed in the context of these understandings and practices, the negotiators must be presumed to be fully aware of them and to have relied upon them in striking their bargain. Hence, if a particular practice is not repudiated during negotiations, it may fairly be said that the contract was entered into upon the assumption that this practice would continue in force." Mittenthal, *Past Practices in the Administration of Collective Bargaining Agreements, supra,* at p. 1034.

The decision of the Court below in applying the parol evidence rule to force exactness in collective bargaining agreements frustrates the national labor policy of promoting industrial peace.

4. The Restrictive Approach to the Interpretation of Contracts Adopted By the Court Below Has No Application to Collective Bargaining Agreements.

Even under common-law contract rules, circumstances existing at the time the contract was made may be considered. RESTATEMENT, CONTRACTS, § 235, COMMENT *e* (1952). Circumstances and prior negotiations must be considered in determining whether or not ostensibly clear language is ambiguous. *Ludwig Honold Mfg. Co.* v. *Fletcher*, 405 F. 2d 1123, 1130 n 31 (3rd Cir. 1969).

The terms of an earlier writing are also such circumstances as must be considered. 3 WILLISTON, CONTRACTS § 628 p. 1804 (REV. ED. WILLISTON AND THOMPSON 1936). Here, the last contract prior to the adoption of the current language prohibited "farm out to any plant or plants". After General Electric bought the Owensboro operation, the phrase "to any other plant or plants" was removed leaving a clause of obscurity as compared to the earlier language. This circumstance highlights the ambiguity of the present clause and calls for other evidence to explain the meaning given it by the parties.

The common law allows the admission in evidence of usage even though it "may contradict or vary implications which otherwise would be drawn from the written or oral expressions of the parties." 3 WILLISTON, CONTRACTS, supra, § 648.[2] The practice between the two

[2] "This necessarily involves the proposition that evidence of usage may be introduced to contradict implications of fact or law

(Footnote continued on following page)

parties is such a usage. 3 WILLISTON, CONTRACTS, supra, § 660. The present "farming out" clause is incomplete. It leaves an implication to be drawn as to "where" the Company may not farm out, let out, or transfer. Usage may be considered to contradict or vary this implication, and to show that the parties intended to prohibit only the sending of work to contractors outside of the General Electric Company. This was the usage between the parties, and it was so admitted by the union representatives in the 1970 bargaining sessions.

The implication drawn by the Sixth Circuit is not only shown to be wrong by past practice and usage, but it is cast in doubt when considered in light of the circumstance that establishment of the Singapore operation was announced over a month before the contract was signed. It is hardly credible that the parties would sign a contract forbidding the activity then underway—the establishment of the Singapore plant.

The common law allows parties to give their own special and different meaning to language of a contract.

> "With Dean Wigmore (Evid. § 2465) we think that there is no reason in the nature of things why the individual parties to a transaction may not employ words or whole phrases in a particular sense irrespective of the ordinary sense." *Nicoll* v. *Pittsvein Coal Co.*, 269 Fed. 968, 971 (2d Cir., 1920).
>
> "So it is often said also that usage is admissible to explain what is doubtful but never to contradict

which in the absence of usage would have been drawn from the writing, since otherwise, there would be no point in proving the usage." 3 Williston, Contracts, *supra*, § 652, p. 1882.

what is plain. If this statement means that usage is not admitted to contradict a meaning apparently plain if proof of the usage were excluded (and this is what the statement seems naturally to mean), it is inconsistent with many decisions and wrong on principle." 3 WILLISTON, CONTRACTS, Supra, § 650, pp. 1875-1876.

Further the view that Courts can find in words but "one plain meaning" is one to be utilized with great caution if at all. "[S]uch a rule is only a 'vestigial remain of a notion prevailing in "primitive law." ' " *Langer* v. *Iowa Beef Packers, Inc.*, 420 F. 2d 365, 369 (8th Cir. 1970). The parties may have intended a meaning quite different from that which appears most obvious as is recognized in *Hurst* v. *W. J. Lake & Co.*, 141 Or. 306, 16 P. 2d 627, 89 A.L.R. 1222 (1932):

> "The flexibility of or multiplicity in the meaning of words is the principle source of difficulty in the interpretation of language. Words are the conduits by which thoughts are communicated, yet scarcely any of them have such a fixed and single meaning that they are incapable of denoting more than one thought. In addition to the multiplicity in meaning of words set forth in the dictionaries, there are the meanings imparted to them by trade customs, local uses, dialects, telegraphic codes, etc. One meaning crowds a word full of significance, while another almost empties the utterance of any import. The various groups above indicated are constantly amplifying our language; in fact, they are developing what may be called languages of

their own. Thus one is justified in saying that the language of the dictionaries is not the only language spoken in America. . . ." 16 P. 2d at 629.

* * * * * * *

"The defendant cites numerous cases in many of which the courts held that, when a contract is expressed in language which is not ambiguous upon its face the court will receive no evidence of usage, but will place upon the words of the parties their common meaning; in other words, in those decisions the courts ran the words of the parties through a judicial sieve whose meshes were incapable of retaining anything but the common meaning of the words, and which permitted the meaning which the parties had placed upon them to run away as waste material. Surely those courts did not believe that words are always used in their orthodox sense." 16 P. 2d at 630.

Professor Corbin has written:

"It is true that when a judge reads the words of a contract he may jump to the instant and confident opinion that they have but one reasonable meaning and that he knows what it is. A greater familiarity with dictionaries and the usage of words, a better understanding of the uncertainties of language, and a comparative study of more cases in the field of interpretation, will make one beware of holding such an opinion so recklessly arrived at." 3 CORBIN, CONTRACTS, § 535, pp. 17-18 (1960). See also IX WIGMORE, EVIDENCE, § 2463 (3rd ed. 1940).

While there is a conflict in the authorities as is recognized in *Hurst* v. *W. J. Lake & Co.*; 3 CORBIN, CON-

TRACTS, § 535; 3 WILLISTON, CONTRACTS § 650; and IX WIGMORE, EVIDENCE, § 2463, all *supra,* the old common law "plain meaning" rule should have no application to collective bargaining agreements as it would serve to frustrate the policy of achieving peace through ability to arrive at agreement.

The approach of the Sixth Circuit in finding the parol evidence rule in its most traditional restrictiveness applicable to exclude other evidence of the true meaning of the contract is contrary to the policy of the national labor laws.

5. The Decision Below Raises Significant Questions Concerning Abuse of Appellate Procedure By Requiring Double Appellate Review and the Opinion Reconsidering a Prior Decision On the Merits Is in Conflict With Applicable Decisions of This Court.

An appellate court may deny an extraordinary writ such as mandamus either because the remedy is not appropriate or on the merits. *Ex Parte, Bakelite Corp.,* 279 U. S. 438 (1929); *Louis* v. *Brown Township,* 109 U. S. 162 (1883); and *U. S.* v. *U. S. District Court,* 444 F. 2d 651, 655 (6th Cir. 1971), aff'd 407 U. S. 297 (1972).

If the mandamus petition is denied on the merits, the action of the Court is res judicata. *Louis* v. *Brown Township, supra; Block* v. *Commissioners,* 99 U. S. 686 (1878); *Overstreet* v. *County of Butte,* 20 Cal. Reptr. 631, 370 P. 2d 335 (1962); *Hollywood Circle* v. *Department of Alcoholic Bev. Con.,* 55 Cal. 2d 728, 13 Cal. Reptr. 104, 361 P. 2d 712 (1961); *Burdick* v. *Harbor*

Spring Lumber Co., 167 Mich. 673, 133 N. W. 822 (1911). See cases collected at Annot. 21 ALR 3d 206 (1968).

The decision below held that the question of whether Respondent was entitled to a jury trial could be reconsidered on appeal. It cited a Sixth Circuit case which had denied mandamus on the merits, *Black* v. *Boyd,* 248 F. 2d 156 (6th Cir. 1957), and a First Circuit case which had denied mandamus as inappropriate, *In re Previn,* 204 F. 2d 417 (1st Cir. 1953). The necessary assumption was that the court had denied mandamus as inappropriate as in *In re Previn,* supra, rather than on the merits. See pp. 50, 51 of the appendix hereto.

The Court erred in its assumption that it had not decided the merits in denying mandamus. The grounds argued for denial of mandamus on the merits were that the District Court had acted within its discretionary powers in allowing amendment of the complaint on the condition that the case proceed to trial without a jury. This was the sole reason given by the Sixth Circuit panel which denied mandamus as is shown by the decisional portion of its order as follows:

> "[L]eave to file an amended complaint may be granted by the court subject to reasonable conditions and that the attaching of such conditions, including the striking of a timely demand for a jury trial on issues raised by the amended complaint, is within the sound discretion of the Court; upon consideration, it is ORDERED that the petition for mandamus be, and it hereby is denied. See *Parissi* v. *Foley,* 203 F. 2d 454 (2d Cir. 1953)."

This Order does not contain any language stating either directly or by inference that mandamus was denied as inappropriate as did the opinion *In Re Previn,* supra. Even the Union understood the Sixth Circuit to have reached the merits. Its application to Circuit Justice Potter Stewart for a stay stated that the Sixth Circuit had "affirmed" the action of the District Court.

The writ of mandamus, providing an exception to the usual federal policy against "piecemeal appeals", *Black* v. *Boyd,* 248 F. 2d 156, 159 (6th Cir. 1967), does not create a right to double appeals.

Respondent did not seek certiorari from the denial of mandamus. "If [it] was not content with the first ruling, [its] remedy was by certiorari to this court. *Angel* v. *Bullington,* 330 U. S. 183." *Brownell* v. *Chase Nat. Bank,* 352 U. S. 36, 39 (1956).

The reconsideration by the Sixth Circuit of an issue it had previously decided on the merits is in conflict with the recognized principles of the common law and the decisions of this Court holding that a denial of mandamus is res judicata. The decision of the Sixth Circuit encourages multiple appellate review of identical issues.

CONCLUSION

The opinion of the Sixth Circuit ignores specific agreements made during bargaining sessions and practices which have been honored by the Company and the Union for 25 years. It jeopardizes GE's ability to remain viable in the receiving tube industry in facing offshore competitors and domestic competitors with offshore facilities and sources.

The Court of Appeals reversed not only the District Court's considered judgment as reflected in its Findings of Fact and Conclusions of Law, but its own prior decision, remanding the case for trial before a jury and prohibiting any evidence of bargaining history, past practice and usage. If GE must be subjected to a second trial, it should not be forced to again defend the Union's claim for $4 million dollars, damages and injunctive relief, handicapped by the Sixth Circuit decision excluding evidence of the specific agreements and practices showing the meaning of the collective bargaining agreement.

Because of the conflicts in the decisions of the Circuits and for the significant reasons of national policy as stated above, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 71-1915

LOCAL 783, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, - - - - - - *Petitioner*

v.

THE HONORABLE JAMES F. GORDON, United States District Judge, United States District Court for the Western District of Kentucky, and

GENERAL ELECTRIC COMPANY, a New York Corporation, - - - - - - - *Respondents*

ORDER—Entered November 26, 1971

BEFORE: PECK, McCREE, and KENT, Circuit Judges.

The petition for mandamus to compel respondent to vacate his order denying petitioner a jury trial having come on to be heard, and it appearing that the action was commenced by petitioner on November 5, 1970, and that the relief sought was purely equitable in nature; and it further appearing that on September 8, 1971, petitioner filed a motion for leave to file an amended complaint that contained a prayer for legal relief; and it appearing that on September 14, 1971, respondent ordered the filing of the aforesaid complaint except for the paragraph contained therein demanding a jury trial on all legal issues; and it appearing that by order of October 12, 1971, respondent declined to allow petitioner a jury trial on the legal issues raised by the amended complaint; and it further appearing that leave to file an amended complaint may be granted by the court

subject to reasonable conditions and that the attaching of such conditions, including the striking of a timely demand for a jury trial on issues raised by the amended complaint, is within the sound discretion of the court; upon consideration, it is ORDERED that the petition for mandamus be, and it hereby is, denied. *See Parissi* v. *Foley,* 203 F. 2d 454 (2d Cir. 1953).

Entered by order of the court
(s) James A. Higgins
Clerk

UNITED STATES OF AMERICA

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY AT OWENSBORO

Civil Action No. 2526

LOCAL 783, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, - - - - - - *Plaintiff*

v.

GENERAL ELECTRIC COMPANY, a New York Corporation, - - - - - - - *Defendant*

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Entered December 28, 1971

The Court finds:

FINDINGS OF FACT

I.

The plaintiff, Local 783, Allied Industrial Workers of America, AFL-CIO (Local 783), and the defendant, General Electric Company (G.E.), are parties to a collective bargaining agreement within the meaning of the Labor Management Relations Act.

II.

This is an action by the said plaintiff to enjoin an alleged violation of the collective bargaining agreement and for damages.

The principal issue is whether G.E. violated the farm-out language of the collective bargaining agreement, which reads as follows:

"Section 5 Farming Out

There shall be no farming or letting out or transfer of machinery or work for the purpose of curtailing or reducing employment in the plant."

This "farming-out" paragraph has appeared in each of the collective bargaining agreements between the parties from 1945 down to the present.

III.

At its multi-plant operations in Owensboro, Kentucky, G.E. manufactures, among other things, receiving tubes for the radio and television industry. On January 21, 1970, it formally announced to the Owensboro employees that mounts for certain miniature tubes would be assembled in Singapore. The parts for these mounts and the machinery for assembling the mounts were shipped from G.E.'s Owensboro plant to G.E.'s Singapore plant. Because of their small size, these mounts could be assembled in large quantities and shipped back to the Owensboro plant for finishing work.

In June, 1970, mount production was commenced in Singapore with a gradual buildup in production until the desired levels of production were reached in October of that year. Receiving tubes are grouped by families with similar characteristics. Mounts for twenty-one different families of miniature tubes have been made in Singapore at various times since the commencement of production. All of the mounts come back to Owensboro for finishing, even though a small quantity of them are completed in Singapore for quality control purposes. (All of these tested tubes come back to Owensboro's G.E. plant for final processing.) In the first eleven months of 1971, the Singapore facility manufactured about 15% of the total number of mounts made in both Singapore and Owensboro.

IV.

Plaintiff has not proved that G.E. breached the collective bargaining agreement.

A. *Article XVI, Section 5—Farming Out.* The prohibition against farming-out or transferring of machinery or work contained in Article XVI, Section 5 of the collective bargaining agreement has no application to a transfer of machinery or work from one G.E. plant to another G.E. plant. This is confirmed by:

(1) The Company's transferring of machinery or work from the G.E. Owensboro plant to other G.E. plants of power tube and cathode ray tube production to Schenectady in 1945, shortly after the farm-out language first appeared in a collective bargaining agreement; the transfer of tube production equipment from Owensboro to Anniston to be used for the manufacturing of miniature tubes formerly manufactured in Owensboro beginning in 1952; and the thick film operation to Syracuse in 1970.

The plaintiff had knowledge of each of these transfers and knew that at the time of the transfers, employment was being reduced in some cases, and in other cases employees were being laid off for inventory adjustment days due to overproduction. The plaintiff also had knowledge of the establishment of the Singapore operation for eight months prior to the filing of its grievance, as testified to by Cecil Harrison, a vice president of the union.

(2) The plaintiff and the defendant agreed that the farm-out language of this article had no application to a transfer from one G.E. plant to another G.E. plant at the time of the negotiation and signing of the current collective bargaining agreement between them, as is shown by minutes of the meeting of the negotiators of

January 20, 1970, and February 3, 1970. During the January 20, 1970, meeting of the parties' representatives, the following exchange occurred between T. E. McQueeney, the Company's representative, and Cecil Harrison, Vice President of the Union, J. B. Arnold, regional representative of the plaintiff, and Dennis Warren, a member of the Union Bargaining Committee:

"McQueeney: Suppose a new business was thinking of coming in here and we told them of the good work climate and people, and then told them that if they were to move equipment in they should know they could never move it out to another of their locations. He'd ask how many other G.E. locations have the problem and we'd say none. He'd say goodbye.

"Dugger: That gets away from farmout. Besides that's not farmout in G.E.

"McQueeney: Can you see how unattractive we could be to a new business? Our current language says we can't farm out for the purpose of curtailing or reducing the work force. Your proposal seems to say that we couldn't move equipment to Springfield.

"Harrison: Even under our language you'd be breaking the agreement when you sent stuff to Sprinfield since it would reduce some work here, if we meant farmout to include with G.E. moves. We don't mean that.

"Arnold: There's quite a difference between farming out and transferring work between locations. We haven't made a stink about that.

"Warren: Look at your thick film move to Syracuse. We didn't complain about that either.

"Erwin: We're aware of the changing realities of a business which says some things come in here from

other G.E. locations and some go out to other G.E. plants. What we want to do away with is farming work out to Faith Tool & Die, or a place like 'Knuckles' when we've got equipment and people in here who can do the work, and we think cheaper, too. We do enough rework at EDC on farmed out stuff to offset the cost of doing it here to begin with, to specifications without rework.

"McQueeney: I'm just not aware of the fact that this does, in fact, go on.

"Erwin: Well, it does, and that's what we don't like. We've never complained about transferring stuff to other G.E. locations. We sent those base staking machines to Tell City and they sent the bases back here for processing for sometime before the machines were finally returned here. We didn't cry about that, because that's not farmout.

"McQueeney: I agree wholeheartedly. Let's discuss this again some more."

Again, on February 3, 1970, the following colloquy occurred:

"McQueeney: Let's take up where we left off at our last meeting. I believe it was on:

Article XVI—Section—Farming Out

It must be pretty evident after our last discussion just how important our concern is for this language. Facing the continuing decline of the core business we want to be able to attract other businesses to take its place. There are two ways we go about getting new employment opportunities into Owensboro. First, we continually look for ways to add new product innovations within the Tube Department such as we did when such things as DDO and Microwave Products were added.

A second effort we make is to search for new departments to move into Owensboro such as the one we announced recently in the Headliner.

Of course, this contract and therefore this farmout language would not affect a new product department such as the one announced, but the very existence of this clause does nothing to enhance the attractiveness of the Owensboro location. Even decisions to add to the Tube Department must involve review and concern for the current farmout provision; this is why I explored so thoroughly with you your interpretation of the current farmout language. First, let me say that we are not willing to revise the current language as you propose; we are simply unwilling to broaden the current spirit and intent of this language. Second, personally I am not happy with even the current language but considering the arbitration rulings which give it definition and considering your interpretation that this language in no way, shape or form applies to the transfer of work or equipment from Owensboro to anyplace within the General Electric Company, on that basis, I'm willing to keep the language we have in the agreement. Have I correctly stated at least that part of your interpretation of this language correctly that is, that the language in no way applies to the transfer of work or equipment from Owensboro to any other location in the General Electric Company?

"Arnold: That's right.

"Erwin: I agree.

"McQueeney: In that case, then, we see no need to change or remove our current language.

"Erwin: All we want is, if you have the space and equipment you keep the work here.

"McQueeney: I understand your intent, but this language is really much broader and expects work to be maintained here regardless of competitive costs, scheduling, and a host of other factors which contribute to such a decision.

"Erwin: We just are sure that we farm out work that could be done in here and then have to rework it so that our final cost is more than if we did it ourselves.

"McQueeney: As I've mentioned to you before, I'm most interested and concerned about any such facts you can bring to our attention. If I'm to correct this situation, I need to arm myself with facts before I can broach the subject to our management. The other point you mentioned was the suspicion of collusion in assigning outside work. Proof of such an allegation would result in those people being removed from the G.E. payroll. We will not stand for any such infractions of Company policy.

"Erwin: We worry about the level of employment, and that's the main reason for us wanting this change. It's even better for you.

"McQueeney: One of the problems with new language is that it disregards all rulings and past practices and opens the whole subject to new interpretation. We will not risk any further restrictions on our ability to get a job done at the best price available, and new language presents such a problem.

"Erwin: You've even got a machinist technician at EDC doing 100% inspection on all work done outside when it's returned. It's probably not figured in the cost.

"McQueeney: I welcome such facts, and also say to you I see no hope of expanding our current language."

In consequence of this exchange between representatives of the parties, new language proposed by the Union was

rejected and the old language of the contract, which had been in effect since July, 1945, was left in the contract and is the present language of the contract.

(3) The Company announced its Singapore operations on January 21, 1970, and shortly thereafter began the transfer of equipment, materials and personnel to Singapore, all of which activities have continued down to date and all of which activties were known to the plaintiff and its members. The plaintiff made no protest over these activities prior to the filing of its grievance of June 2, 1970. The grievance was heard in a Step III grievance session on June 16, 1970, in which the following colloquy occurred in respect to the meaning of the farm-out language:

> "(Dodson) This is a union grievance charging violation of the farmout language. I reviewed excerpts of our minutes taken during contract negotiations and was under the impression then, and still am, that we all understood the farm-out language. We have the understanding that farm-out referred to firms such as Faith Tool & Die, etc., and not another G.E. plant. Therefore, it is our position that we are not violating the contract language.
>
> "(Erwin) At no time did we mention of machines and work being farmed out to foreign competition.
>
> "(Dodson) The distance doesn't matter, it's still a G.E. plant. What's the difference if we took it to Tell City or Singapore?
>
> "(Erwin) In the case of Tell City or Springfield it has been a reciprocal situation.
>
> "(Dugger) They're going to start the product over there and complete it here. This thing is going to hurt our people in Owensboro. . . .
>
> "(Erwin) When we were talking we at no time approved the transfer of machinery to Singapore thereby curtailing employment. Singapore in no way entered

into our discussion. At Tell City, for example, you have a decent rate of pay. When you're working people for 16¢ per hour in Singapore, that a lot of difference.

"(Dodson) What you're saying is that the distance and rate of pay determines farm-out.

"(Dugger) The tubes will probably be stamped 'Made in USA.'

"(Erwin) Not until after you signed the contract did you mention the Singapore Operation.

"(Dodson) The possibility of an offshore facility has been discussed for some time.

"(Erwin) Not in our circles. You talk about foreign competition, and G.E. *is* the foreign competition.

"(Roberts) The boys upstairs must be hypocrites.

"(Erwin) We were never talking about send work overseas.

"(Dodson) You say there's a differnce between the continental United States and overseass?

"(Erwin) You're removing that work.

"(Chancellor) What Denny is referring to is the contract language. Is your interpretation in this matter that we could send this work to say Trenton, N. J. and it wouldn't be farm-out, but if it goes geographically out of the country then it is?

"(Erwin) I may be wrong, but I believe anyone sitting in judgment will recognize the difference."

(4) The Company is not transferring machinery or work to Singapore "for the purpose of curtailing or reducing employment" in the plant, but on the contrary, it is attempting to preserve and protect the employment at its Owensboro plant by meeting Japanese and other offshore competition

in the receiving tube industry. The magnitude of the adverse effect upon the Company and its employees of the foreign competition is illustrated as follows:

> The Company's share in the original equipment market (TV sets and radios sold domestically) for receiving tubes declined from 25.4% to 17% in the four years from 1966 to 1970, whereas tubes imported in the same market increased from 28.3% to 48%; in the total U. S. receiving tube market (original equipment and renewal sales) sales of imported tubes increased from 19.9% to 22.7% by November, 1971, while the total market was declining from 412 million tubes to 218 million tubes, an almost 50% decrease; and during this five-year period of decreasing sales and of a decreasing market for tubes and increased foreign encroachment, employment at the Owensboro plant has been steadily decreasing despite G.E.'s efforts to prevent this by closing down other plants and bringing their production into Owensboro. Foreign tube manufacturers have driven the prices for tubes sold in the United States lower and lower. On the average, G.E.'s direct overhead, labor and material costs exceed the price of Japanese miniature tubes. For example, when the Japanese price went below the direct cost of tuner tubes, and G.E. was unable to meet the new price, it lost annual sales of 2.3 million tubes to Sarkes Tarzan, a large tuner tube customer.

General Electric's witnesses could not say positively, as of this date, whether or not the Singapore operation would make it possible to reduce the variable cost of tube production and, therefore, the price of the tube sufficiently to regain its customers; but G.E. has already sold 4¼ million tubes below cost in the expectation that the Singapore op-

eration will soon make it possible to continue to sell at these prices.

The cost reduction from the Singapore operation for the type tubes manufactured there has not only made possible the sale of these tubes, but it will increase the sale of tubes manufactured wholly at the Owensboro plant. This is because G.E. sells a "market basket" of tubes to its principal customers with some of the tubes in the "market basket" being those which are partially made in Singapore and some being those which are made entirely in Owensboro.

When, subject to price competition, General Electric Company reduced the price of the tube kit known as the "All American Five" from $3.50 to $.91, two of its largest competitors, Sylvania and RCA got out of the business of producing and selling these tubes rather than reduce the price. Seven receiving tube manufacturers have gone out of the business entirely due to market declines and foreign competition.

The Witness Farnsworth testified, and the Court finds, that the question is not whether to make the tube mounts in Singapore or in Owensboro; it is a question of making them in Singapore or not making them at all.

(5) The plaintiff has not established that there has been any diminution of employment caused by the Singapore plant. While employment has declined since first production in Singapore in June, 1970, the market for receiving tubes also has been declining due to foreign competition, replacement of receiving tubes by improved technology, and general economic conditions. The October, 1969, and June, 1970, layoffs were due to ecnomic conditions and were not related to the Singapore operation. From July, 1970, down to date, the Company called back more employees than were laid off. A finding that the Owensboro employment reductions bears a causal relationship to the establishment of the Singapore plant would be based on pure speculation. There-

fore, this Court finds that plaintiff has not shown any reduction in local employment as a result of G.E.'s Singapore operation.

B. Article XVI, Section 3. The shipment of equipment to Singapore was begun months before filing of either of the grievances described in the complaint and any machinery and work thus transferred was not transferred as a result of a grievance in process within the meaning of Article XVI, Section 3. In addition, the plaintiff has not established that any work was transferred out of the plant *as a result* of the first grievance.

C. *Article V, Section 2.* The Union has not established that the Company has transferred any jobs under dispute within the meaning of Article V, Section 2, of the agreement. There was no dispute as to any job at the time of G.E.'s establishment of its Singapore operation.

CONCLUSIONS OF LAW

I.

Plaintiff contends that the introduction of the minutes of the January 21, 1970, and February 3, 1970, bargaining sessions is not admissible in evidence.

Firstly, in interpreting a collective bargaining agreement, the courts and arbitrators should not be bound by the usual rules in contract construction and should make wide use of all relevant materials.

> "In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve." *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 4 L. ed. 2d 1403, 80 S. Ct. 1343 (1960), 363 U. S. at 567, 4 L. ed. 2d at 1406, 1407.

In elaborating on the opinion of the Court in the *Steelworkers Trilogy,* of which *United Steelworkers* v. *American Mfg. Co.* cited above is one, Mr. Justice Brennan and Mr. Justice Harlan commented as follows:

> "Words in a collective bargaining agreement, rightly viewed by the Court to be the charter instrument of a system of industrial self-government, like words in a statute, are to be understood only by reference to the background which gave rise to their inclusion. The Court therefore avoids the prescription of inflexible rules for the enforcement of arbitration promises. Guidance is given by identifying the various considerations which a court should take into account when construing a particular clause—considerations of the milieu in which the clause is negotiated and of the national labor policy." *United Steelworkers* v. *American Mfg. Co.,* at 363 U. S. 570, 4 L. Ed. 2d 1432, 1433.

See also *Forrest Industries, Inc.* v. *Local No. 3-436,* 381 F. 2d 144 (9th Cir. 1967), which, in following the directions of the Court in the *Steelworkers Trilogy,* held as follows:

> "As Mr. Justice Brennan has observed, words in particular collective bargaining agreements are like words in a statute. The same word may have different meanings in different contexts and the language in each agreement should be construed with reference to the particular practices, background and milieu which gave rise to its use."

And see *Communications Wkrs. of Amer.* v. *Pacific N.W. Bell Tel. Co.,* 337 F. 2d 455 (9th Cir. 1964).

> "The very nature of a collective bargaining agreement requires that it be read in the light of bargaining history and the history of the parties' own interpretations." 337 F. 2d at 459.

For additional authorities holding that there is broad latitude in the admissibility of bargaining history to construe a collective bargaining agreement, see:

Local No. 483 v. *Shell Oil Co.*, 369 F. 2d 526 (7th Cir. 1966);

Local No. 787 v. *Collins Radio Co.*, 317 F. 2d 214 (5th Cir. 1963);

Pacific N. W. Bell Tel. Co. v. *Communications Wkrs.*, 310 F. 2d 244 (9th Cir. 1962); and

East Bay Union v. *Fibreboard Paper Prod. Corp.*, 285 F. Supp. 282 (N.D. Calif. 1968).

This is a case in which the issues before the Court are specifically excluded from arbitration by the collective bargaining agreement. Therefore, the Court performs the arbitrator's function and should consider the same evidence which the arbitrator would consider.

> "When actions for breach of the substantive terms of the contract are instituted under Section 301 in the absence of arbitration clause, the courts should assume the arbitrator's responsibility." Archibald Cox, Reflections Upon Labor Arbitration, *72 Harv. L. Rev.* (1959).

And the arbitrator's function is to recognize that collective bargaining agreements leave much unsaid, the answers to which must be found outside of the agreement itself.

> "There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institu-

tional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words." Archibald Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. (1959) pp 1498, 1499, quoted with approval in *United Steelworkers of America* v. *Warrior & Gulf Navigation Company*, 363 U. S. 574, 579-580; 4 L. ed. 2d 1409, 1415-1416; 80 S. Ct. 1347.

Secondly Article XVI, Section 5 of the agreement before the Court is ambiguous and, therefore, may be explained under the parol evidence rule. The clause prohibits farming-out, letting-out, or transfer for the purpose of curtailing or reducing employment "in the plant". The entire clause escapes any well-defined generally accepted meaning. Further, the contract uses the word "plant" in so many different ways that the meaning of the word is not clear. See Article V, Section 2 "the local plant", and Article XVI, Section 3 "a plant".

The language of Article XVI, Section 5, first appeared in the collective bargaining agreement between the parties of July, 1945. The immediately preceding collective bargaining agreement of May, 1944, contained an entirely different provision as follows:

> "4. The Company agrees that it will not farm out any of its work to any other plant or plants for the purpose of curtailing or reducing employment in its plants covered by this contract."

The change from the 1944 to the 1945 contract language was a change from comparative clarity to one of obscurity. The parties could have resolved the ambiguity by using the

phrase "the local plant" or by prohibiting farming-out to "any other plant or plants". In light of the many different uses of the phrase, the defendant is entitled to explain the meaning of the word by the introduction of prior understandings as to this meaning. Restatement of Contracts, §§ 238, 231 and 242.

II.

Plaintiff argues that evidence may not be heard to explain the meaning of one portion of Article XVI, Section 5, but then urges the Court to consider evidence to explain another portion of it. The plaintiff urges that the words "for the purpose" do not mean what they say. It offers in evidence the Arbitration Award of Hon. Paul H. Sanders, dated July 11, 1959, construing "purpose of" to mean "effect of".

Consistent with the authorities cited under Item I, the Court has considered this Arbitration Award. It has also considered the Arbitration Award of Hon. Leo C. Brown, dated March 23, 1964, holding that "purpose of" means "intent".

The two Arbitrators Awards are conflicting and neutralize one another. The plaintiff has not presented any other evidence as to agreements or contemporaneous constructions between the parties as to the meaning of the language. Defendant has, however, shown the opposing constructions of the language as reflected in the Arbitrators Awards and has further shown that in 1966 and 1970, the Union sought a modification of Article XVI, Section 5, to strike the phrase "purpose of" and to provide that it should be a violation of the contract to transfer, contract, or subcontract any work by the Company, "provided it has the facilities for doing the work, the floor space, and the available trained personnel". These proposals were rejected by the Company and have never been incorporated into the collective bargaining agreement.

The Court is therefore left to construe the phrase in the light of the Union's attempts to modify it and in the light of the common meaning of the words used. In this regard, the word "purpose" is defined in the Oxford Universal Dictionary on Historical Principals (1955) as follows:

> "To place before oneself as a thing to be done or attempted; to form a purpose of doing (something)."

The Court finds as a matter of law that the parties are bound by the dictionary and common meaning of the word "purpose" as requiring an intent or design to reduce the employment in the plant. As shown in the Findings of Fact above, the plaintiff has not proven such an intent or design on the part of the defendant.

III.

Plaintiff also objects to the introduction of evidence of the past practices of the parties in construing Article XVI, Section 5. The past practices of the parties are admissible in determining the meaning. *Pittsburg Die Sinkers Lodge No. 50* v. *Pittsburg Forgings*, 255 F. Sup. 142 (WD Pa., 1966), and *Colorado Milling & Elevator Co.* v. *Glenn*, 118 F. Sup. 943 (WD Ky., 1954). Where the identical language has appeared in a series of collective bargaining agreements over a long period of years, the past practices of the parties under all of the prior agreements is admissible. *Pekar* v. *No. 181*, 311 F. 2d 628 (6th Cir. 1962).

IV.

Plaintiff cited *United Shoe Workers of America, Local 127, AFL-CIO* v. *Brooks Shoe Mfg. Co.*, 298 F. 2d 277 (3rd Cir., 1962), apparently for the proposition that any movement of machinery and work between two plants is a contract violation. Of course, each case must be determined in the light of the particular collective bargaining agreement. The contract before the Court in the *Brooks Shoe*

case, *supra*, was quite different in that the farm-out clause concluded with the following:

> "It is agreed that the firm will continue to make the better grade shoes in their present plant."

There was also a run-away shop clause providing that:

> "It is agreed by the Employer that the shop or factory shall not be removed from the County of Philadelphia during the life of this agreement."

As previously noted, the language in Article XVI, Section 5, is quite different from that in *Brooks Shoe*.

V.

In view of the above Findings of Fact and Conclusions of Law, the Union has not established its burden of proof that there has been any violation of either Article XVI, Section 6, Article XVI, Section 3, or Article V, Section 2, of the collective bargaining agreement.

Dated this 27 day of December, 1971.

(s) James F. Gordon, *Judge*
United States District Court,
Western District of Kentucky

UNITED STATES OF AMERICA

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

Civil Action No. 2526

LOCAL 783, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, - - - - - - *Plaintiff*

v.

GENERAL ELECTRIC COMPANY, a New York Corporation, - - - - - - - - *Defendant*

JUDGMENT—Entered January 13, 1972

This cause having been tried before the Court and the Court having entered Findings of Fact and Conclusions of Law,

NOW, THEREFORE, be it ordered and adjudged that the complaint and all claims asserted therein by the plaintiff be, and hereby are, dismissed with prejudice and at the cost of the plaintiff.

Dated this 12th day of January, 1972.

(s) James F. Gordon, Judge
United States District Court
Western District of Kentucky

Prepared by and Submitted for Entry by:
Sandidge, Holbrook, Craig & Hager

By (s) Morton Holbrook
Attorneys for Defendant

Have Seen and Objected to:

Lovett, Kusch and Wible
By (s) Charles S. Wible
Attorneys for Plaintiff

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 72-1260

LOCAL 783, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,
Plaintiff-Appellant,

v.

GENERAL ELECTRIC COMPANY,
Defendant-Appellee.

APPEAL from the United States District Court for the Western District of Kentucky.

OPINION—Decided and Filed January 5, 1973.

Before: CELEBREZZE, McCREE and MILLER, Circuit Judges.

CELEBREZZE, Circuit Judge. This case involves an appeal from two determinations of the District Court: the first from a preliminary order granting the Appellant Union permission to file an amended complaint and striking from the amendment the demand for a jury trial; the second from the final judgment of the District Court dismissing the Union's complaint.

The Local 783 of the Allied Industrial Workers of America (the Union) and General Electric Company (the Company) are parties to a collective bargaining agreement dated March 3, 1970 and to remain in force through August 19, 1973. The agreement covered the Company's facilities

at its Owensboro, Kentucky location.[1] The dispute in question involves the Company's alleged violation of a farming-out clause contained in the present agreement and in all of the previous agreements between the Union and the Company since 1945. That clause, Article XVI, Section 5 of the present agreement, provides the following:

> "There shall be no farming or letting out or transfer of machinery or work for the purpose of curtailing or reducing employment in the plant."

On March 5, 1970 the Company began a transfer of equipment from its Owensboro facilities to its new plant in Singapore. Subsequent shipments of equipment to the Singapore plant were made periodically throughout 1970 and 1971. Presently, the Company is producing at its Singapore plant tube mounts previously made at the Owensboro facilities.

The original complaint filed by the Union sought to enjoin the Company from transferring machinery, equipment or work from its Owensboro, Kentucky facilities to Singapore or any other location in violation of the collective bargaining agreement between the Union and the Company. While it was alleged that other sections of the Agreement had been breached by the Company, the central question centered around the interpretation of the farming-out clause. It is the Union's position that this operation is a transfer of machinery or work prohibited by the above clause, while the Company contends that the clause does not

---

[1]The preamble to the Agreement provides:
"This Agreement is made and entered into between the General Electric Company for its Owensboro operations, Tube Department, with offices located at 316 East Ninth Street, Owensboro, Kentucky, hereinafter referred to as the 'Company' and Local 783 of the International Union Allied Industrial Workers of America, affiliated with the AFL-CIO, hereinafter referred to as the 'Union.' "

apply to transfers of equipment to another General Electric plant.

The District Court determined that the wording of the clause was ambiguous and that parol evidence could be introduced to explain its meaning. The District Court found that the prohibition did not apply to a transfer of machinery or work to another General Electric plant. It is argued by the Union that the clause is clear and unambiguous and that it was error for the District Court to consider evidence of the bargaining history of the two parties relating to the clause and of prior practices involving other transfers of work by the Company.

We first turn our attention to the question of whether the Court erred in not granting the Union a jury trial on its amended complaint. The motion for permission to file an amended complaint was filed some nine months after the original complaint was filed and eight days before the date set for trial. The amended complaint added a claim for money damages for wages lost by employees who had allegedly been laid off because of the transfer of operations to Singapore. The District Court struck the paragraph in the amended complaint which demanded a jury trial and permitted the Union to brief the question of whether a jury trial should be granted. After the Court determined that it would not grant a jury trial, the Union petitioned this Court to issue a writ of mandamus to compel the District Court to vacate its order denying a jury trial. We declined to issue the writ. The Company contends that this issue is not now open to reconsideration.

We have previously held that mandamus will not be used to review an interlocutory order except in extreme and exceptional cases. *Black* v. *Boyd*, 248 F. 2d 156 (6th Cir. 1957), *modified*, 249 F. 2d 441. In the *Black* case, we determined that an order of the District Judge denying petitioner's right of trial by jury presented an exceptional sit-

uation in which it would be appropriate to review the ruling on a petition for mandamus. We found that the refusal to grant the demand for a jury trial, when it had been timely made as a matter of right, could be vacated by the issuance of a writ of mandamus. What is presented here, however, is a different issue. It is contended that the Union's demand for a jury trial was denied, not because it was within the Court's discretion to deny the demand under Rule 39(b) of the Rules of Civil Procedure,[2] but because the trial judge can properly condition his granting of a motion to file an amended complaint under Rule 15(a).[3] In the *Black* case we noted that writs of mandamus have been issued in several cases in order to protect the right of trial by jury but we indicated that such might not be the case where the matter was one within the discretion of the Court. 248 F. 2d 156, 161. *In re Previn*, 204 F. 2d 417, (1st Cir. 1953), involved such a situation and the Court there determined that the matter was one to be settled when and if the case came on appeal from a final judgment. The question presented was whether the trial judge had abused his discretion in not granting a jury trial despite the fact that a timely demand had not been made.

---

[2]Rule 39(b) provides that ". . . notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues."

[3]Rule 15(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

We do not deal here with a judge's exercise of discretion in granting a jury trial even though a timely demand was not made. In such cases the party seeking a jury trial bears a heavy burden in attempting to show an abuse of discretion by the judge. *Noonan* v. *Cunard Steamship Co.*, 375 F. 2d 69 (2d Cir. 1967). *McNabb* v. *Kansas City Life Insurance Co.*, 139 F. 2d 591 (8th Cir. 1943). Our question is whether a judge can, within his discretion, permit a party to amend his complaint only on the condition that a timely demand for a jury trial be stricken from the amended complaint. We think that, given the proper circumstances, such action by the judge would be reasonable. *See Parissi* v. *Foley*, 203 F. 2d 454 (2d Cir. 1953), *rev'd on other grounds*, 349 U. S. 46 (1955). The question, then, is whether the circumstances in this case warranted such a condition. We think they did not. Under Rule 15(a) of the Rules of Civil Procedure, the Union could only amend its complaint by leave of court or by written consent of the adverse party. Here it sought to amend by leave of Court. The granting or refusing leave to amend under the particular circumstances of the case rests in the sound discretion of the trial judge, *Strickler* v. *Pfister Associated Growers, Inc.*, 319 F. 2d 788 (6th Cir. 1963). Rule 15(a), however, provides that "leave shall be freely given when justice so requires." In the absence of any justifying reason, "this mandate is to be heeded." *Foman* v. *Davis*, 371 U. S. 178, 182 (1962). In *Foman*, some factors which would justify a denial of a motion to amend were identified as undue delay, bad faith, undue prejudice to the opposing party, repeated failure to cure deficiencies by previous amendments, and futility of amendment. We find none of these or any other circumstances in this case which would have justified a refusal to permit the Union to amend its complaint.

This determination, however, is not dispositive of this issue. The question remains, if the circumstances do not justify refusal of permission to amend, do they warrant the

condition to the amendment that no jury trial would be granted? The right to a jury trial is guaranteed by the Seventh Amendment and "occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick* v. *Schiedt,* 293 U. S. 474, 486 (1935).[4] It becomes discretionary with the trial judge to grant a jury trial only when the right has been waived by failure to make a demand. But even when exercising its discretion under Rule 39(b) of the Federal Rules of Civil Procedure, "the court should grant a jury trial in the absence of strong and compelling reasons to the contrary." *Swofford* v. *B & W, Inc.,* 336 F. 2d 406, 409 (5th Cir. 1964), *cert. denied,* 379 U. S. 962 (1965). Here, however, there was no waiver of the right. The original complaint requested only injunctive relief and was not triable by jury as a matter of right. The amended complaint requested additional relief in the form of money damages and was triable by jury as a matter of right. The jury demand made in the amended complaint was, therefore, timely. *See Bereslavsky* v. *Kloeb,* 162 F. 2d 862 (6th Cir. 1947), *cert. denied,* 332 U. S. 816 (1947),

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[4]Rule 38 of the Federal Rules of Civil Procedure restates this right and governs the procedure in demanding a jury:

> (a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.
>
> (b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.
>
> * * * * * * *
>
> (d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Bereslavsky v. *Caffey*, 161 F. 2d 499 (2d Cir. 1947), *cert. denied*, 332 U. S. 770 (1947).

As we have noted before, "[i]n the exercise of sound discretion, the granting of leave to amend can be conditional in order to avoid prejudice to the opposing party." *Strickler* v. *Pfister Associated Growers, Inc.*, 319 F. 2d 788, 791 (6th Cir. 1963). A requirement that the amendment be filed by a specified date or that the party amending bear a portion of the additional cost to the opposing party would, in proper circumstances, be reasonable conditions. *Firchau* v. *Diamond National Corp.*, 345 F. 2d 269 (9th Cir. 1965). The circumstances may even warrant, as was the case in *Parissi* v. *Foley*, 203 F. 2d 454 (2d Cir. 1953), *rev'd on other grounds*, 349 U. S. 46, the condition that the case continue to be tried to the court, even though the amendment raises issues triable to a jury. But it is our opinion that the circumstances must indeed be exceptional before a party is required to forego his constitutional right to a trial by jury. "The federal policy favoring jury trials is of historic and continuing strength," *Simler* v. *Conner*, 372 U. S. 221, 222 (1963), and any doubt should be resolved in favor of permitting a jury trial. *Nice* v. *Chesapeake and Ohio Ry.*, 305 F. Supp. 1167, 1185 (W.D. Mich. 1969). *See AMF Tuboscope, Inc.* v. *Cunningham*, 352 F. 2d 150 (10th Cir. 1965). Here the amendment was filed eight days before the scheduled start of the trial. That it was not imperative that the trial begin on the scheduled date is indicated by the fact that the trial judge set the date for trial back two months in order to have the parties brief the issue of whether a jury trial should be granted. Thus, we have a set of circumstances entirely different from those present in *Parissi, supra*, where the case had already been through sixteen days of trial, the amendment was the second filed by the defendant, and it was the defendant who had insisted that the trial begin on a specified date. There is no indication of any improper motive on the part of the Union in filing

its amendment, or that its sole purpose in filing the amendment was to obtain a jury trial. The Court noted merely that nine months had elapsed since the filing of the original complaint and that the case had been set for trial. For these reasons, the Court stated that it was exercising its discretion in declining to allow the Union a trial by jury on the issues of its amended complaint. While the Court did not specifically state that it was exercising its discretion under Rule 15(a),[5] we have treated its order as such because it is clear that the Court would otherwise not have been faced with an exercise of discretion. *Bereslavsky* v. *Kloeb*, 162 F. 2d 862 (6th Cir. 1947), *cert. denied*, 332 U. S. 816 (1947). Accordingly, we find that the circumstances present in this case were not of the exceptional nature required to permit the attachment to the amended complaint the condition that the new issues would not be tried to a jury.[6]

We now look to the question of whether the Court erred in admitting evidence of negotiation discussions and past practices in interpreting the contract. The first determination to be made in this regard is whether the clause of the contract is clear and unambiguous in its meaning. We think that it is. The clause states that "[t]here shall be no . . . transfer of machinery or work for the purpose of curtailing or reducing employment in the plant." We can attach but one meaning to this sentence. The Company may not transfer any work or machinery which has as its purpose the re-

[5]The order of the district Court read: "The Court declines, in the exercise of its discretion, to allow the plaintiff a trial by jury on the issues of its Amneded Complaint, said amendment not being tendered until nine (9) months had elapsed, during all of which time plaintiff could have amended its Complaint, and after the case was set for trial. SO ORDERED."

[6]Of course, when an action involves both equitable and legal issues, as here, "only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims." *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500, 510-511 (1959).

duction of employment in the plant. The preamble to the contract states that its agreement is between General Electric's Tube Department at [illegible] operations and the local Union. We [illegible] that "the plant" refers to anything [illegible] operation of General Electric.

We have previously held that the determination of whether a clause in a contract is ambiguous is a question for the court to decide. *Tennessee Consolidated Coal Co.* v. *United Mine Workers of America*, 416 F. 2d 1192 (6th Cir. 1969), *cert. denied*, 397 U. S. 964 (1970). Only when the court has determined that the contract is ambiguous is a construction of the clause necessary. After a finding of ambiguity has been made, "[e]vidence of the surrounding circumstances and the practical construction of the parties is admissible to aid in its interpretion." *Tennessee Consolidated Coal Co.* v. *United Mine Workers of America*, 416 F. 2d 1192, 1198 (6th Cir. 1969), *cert. denied*, 397 U. S. 964 (1970). It is true that there is generally broad latitude in the admissibility of bargaining history to construe a collective bargaining agreement. But where the meaning of the clause in question is clear, no construction is necessary. In *Pekar* v. *Local Union No. 181*, 311 F. 2d 628 (6th Cir. 1962) we stated that a contract "must be construed to give effect to the intent of the parties when it was made and the circumstances existing at the time it was made should be looked to to ascertain the intent." *Pekar, supra*, 311 F. 2d 628, 636. In that case, however, there was a finding that the disputed clause was ambiguous and was in need of construction. Here we make no such finding. *See N.L.R.B.* v. *Gulf Atlantic Warehouse Co.*, 291 F. 2d 475 (5th Cir. 1961); *International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *General Electric Co.*, 332 F. 2d 485, 490 (n.5) (2d Cir. 1964), *cert. denied*, 379 U. S. 928 (1964); *Anson* v. *Hiram Walker & Sons, Inc.*, 222 F. 2d 100 (7th

Cir. 1955), *cert. denied*, 350 U. S. 840 (1955), *rehearing denied*, 248 F. 2d 380 (7th Cir. 1957).

While the Supreme Court said in *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564 (1960), that "special heed should be given to the context in which collective bargaining agreements are negotiated," 363 U. S. 564, 567, the Court based its decision on the fact that the agreement specifically required arbitration. Similarly, in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960), the Court, in determining the meaning of an arbitration clause in the collective bargaining agreement, held that evidence of bargaining history was not to be used to decide whether a particular dispute was arbitrable. Rather, the Court relied on the language used in the arbitration clause. The Court did say that the "labor arbitrator's source of law is not confined to the express provisions of the contract as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it," 363 U. S. 574, 582. We do not think the Court was formulating a rule that provides for the use of evidence apart from the contract language itself, even though the meaning of the contract is clear. Rather, we think that the Court was stating that such evidence is to be used *when the contract is in need of interpretation.* Other courts have reached the same conclusion. In *N.L.R.B.* v. *Gulf Atlantic Warehouse Co.*, 291 F. 2d 475 (5th Cir. 1961), the Court discussed the decision in the *Steelworkers* case:

> "Although the Court was there dealing with the right to arbitrate, a right highly favored by the law, we think that we have a lesson to learn from this litigation—that lesson is that we generally take the terms of the contract as finally written and do not give them a special

meaning because of anything done by way of give and take during the bargaining sessions." 291 F. 2d 475, 478.

See also International Union of Electrical, Radio and Machine Workers, AFL-CIO v. *General Electric Co.*, 332 F. 2d 485 (2d Cir. 1964), *cert. denied*, 379 U. S. 928 (1964).

Since we find that the farming-out clause is clear on its face and not ambiguous, we therefore hold that evidence of bargaining history is not admissible to explain its meaning.

The fact that the Union may have waived violations of the farming-out clause in the past would not prevent it from asserting its claim against the present possible violation. Whether or not the Union knowingly waived its claim against the alleged violation by renegotiating the agreement with knowledge of the activities of the Company is a factual question to be resolved by the jury, *see Local 127, United Shoe Workers of America, AFL-CIO* v. *Brooks Shoe Manufacturing Co.*, 298 F. 2d 277 (3d Cir. 1962), as is the question of whether the action taken by the Company in reducing employment at its Owensboro plant breached the collective bargaining agreement.

The judgment of the District Court is therefore reversed and the case is remanded to the District Court for a trial by jury in conformity with the opinion of this Court.

McCree, Circuit Judge (concurring). I agree that the clause prohibiting the transfer of work is not ambiguous insofar as it proscribes transfer to another General Electric plant. Accordingly, it was error to admit evidence of negotiation discussions and past practices to interpret this provision. However, I do not understand the majority opinion to hold that the meaning of the phrase "for the purpose of curtailing or reducing employment" is unambiguous. The meaning of this phrase, as well as the determination whether there was a causal relationship between the intra-company transfer and reduction of the work force at the Owensboro plant, are issues to be determined upon retrial.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 72-1260

LOCAL 783, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, - - *Plaintiff-Appellant,*

v.

GENERAL ELECTRIC COMPANY, - - *Defendant-Appellee.*

JUDGMENT—Entered January 5, 1973

Before: CELEBREZZE, McCREE and MILLER, Circuit Judges.

APPEAL from the United States District Court for the Western District of Kentucky

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case is remanded for a trial by jury.

It is further ordered that Plaintiff-Appellant recovers from Defendant-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.
(s) JAMES A. HIGGINS,
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 72-1260

LOCAL 783, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, - - *Plaintiff-Appellant,*

v.

GENERAL ELECTRIC COMPANY, - - *Defendant-Appellee.*

ORDER—Entered February 7, 1973

Before: CELEBREZZE, McCREE and MILLER, Circuit Judges.

On consideration of the Defendant-Appellee's petition for rehearing and suggestion of rehearing en banc, no Judge of this Court having moved for rehearing en banc, and the petition having been referred, under the Court's Rules, for disposition by the panel which heard the case, the motion for rehearing is denied.

ENTERED BY ORDER OF THE COURT

(s) JAMES A. HIGGINS

Clerk

FILE COPY

FILED
JUN 7 19
MICHAEL RODAK, JR.,

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1500

GENERAL ELECTRIC COMPANY

Petitioner,

vs.

LOCAL 783, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1500

GENERAL ELECTRIC COMPANY

Petitioner,

vs.

LOCAL 783, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether evidence of prior negotiation discussions and past practices was not admissible to interpret the meaning of a contract, where the contract language was clear and unambiguous.

2. Whether the Sixth Circuit Court of Appeals properly held that the Union was entitled to a jury trial on its Amended Complaint.

STATEMENT OF THE CASE

Local 783, Allied Industrial Workers of America, AFL-CIO (the Union), and General Electric Company (the Company) are

parties to a Collective Bargaining Agreement dated March 3, 1970, and to remain in effect until August 19, 1973, covering the Company's facilities in Owensboro, Kentucky.

The breach of contract action brought by the Union against the Company involves Article XVI, Section 5, which provides as follows:

> "There shall be no farming or letting out or transfer of machinery or work for the purpose of curtailing or reducing employment in the plant."

The above-quoted contractual language has been contained in all of the previous agreements between the Union and the Company since 1945.

On March 5, 1970, the Company commenced a transfer of machinery and work from its Owensboro facilities to its new plant in Singapore. These shipments were continued periodically throughout 1970 and 1971.

The Company produces at its Singapore plant tube mounts previously made at the Owensboro facilities covered by the Collective Bargaining Agreement.

Over 300 employees were layed off from the Company's Owensboro facilities, all of whom had performed the same work being done at the Company's Singapore plant.

The Union filed a grievance alleging a violation of Article XVI, Section 5, by virtue of the transfer of machinery and work from Owensboro to Singapore. This grievance was processed through the various steps in the grievance procedure.

After completion of the grievance procedure, the Union sought arbitration, but grievances arising under Article XVI, Section 5 are specifically non-arbitrable except by consent of the Company, and the Company refused the Union's request for arbitration.

The Union filed suit in state court to enjoin the Company from transferring machinery, equipment and work from its Owensboro facilities to Singapore or any other location in violation of

Article XVI, Section 5 of the Collective Bargaining Agreement between the parties. A restraining order as requested by the Union was issued in the state court. The Company then removed the action to the District Court, and the District Court denied the Union's motion for a temporary injunction and dissolved the restraining order issued in state court.

Nine months after removal to Federal Court and eight days before the case was scheduled for trial before the Court, the Union moved to amend its complaint to assert a claim for money damages on behalf of its members for loss of wages and fringe benefits resulting from the Singapore transfer. In its tendered amended complaint, the Union expressly demanded a jury trial.

The District Court granted the Union leave to file its amended complaint, except as to the jury trial demand, but permitted the Union and the Company to file briefs on the question of whether a jury trial should be granted.

After the District Court declined to allow a jury trial, the Union petitioned the Court of Appeals for a writ of mandamus to compel the District Court to vacate its order denying a jury trial. The Court of Appeals declined to issue the writ.

After the Union unsuccessfully attempted to obtain a stay of the non-jury trial for the purpose of petitioning this Court for certiorari to review the denial of mandamus, the case proceeded to trial before the District Court without a jury.

The District Court held that the wording of the clause in question was ambiguous and that evidence of negotiation discussion and past practices could be introduced to explain the meaning of the contractual language. The District Court further found that the prohibition of Article XVI, Section 5 did not apply to a transfer of machinery or work to another General Electric plant and dismissed the complaint for lack of liability.

The Court of Appeals reversed the Judgment of the District Court on the grounds that: (1) " . . . . the circumstances present in this case were not of the exceptional nature required to per-

mit the attachment to the amended complaint the condition that the new issues would not be tried to a jury" 471 F.2d 751, 756; and (2) "Since we find that the farming-out clause is clear on its face and not ambiguous, we therefore hold that evidence of bargaining history is not admissible to explain its meaning." 471 F.2d 751, 758.

ARGUMENT

1.

The Decision below is not in conflict with the decision of another Court of Appeals on the same matter.

The Decision rendered by the Sixth Circuit Court of Appeals is not in conflict with the decision of another court of appeals on the same matter. The Seventh and Ninth Circuit decisions cited by Petitioner do not present any conflicts with this case. *Forest Industries, Inc. v. Local U. No. 3-436, Int. Woodworkers,* 381 F.2d 144 (9th Cir. 1967); *Pacific Northwest Bell Tel. Co. v. Communications Wkrs. of A.*, 310 F.2d 244 (9th Cir. 1962); *Independent Petroleum Workers v. American Oil Co.*, 324 F.2d 903 (7th Cir. 1963), Aff'd Per Curiam by eq div ct. 379 U.S. 130 (1964) rehearing denied 379 U.S. 985 (1965); *General Teamsters, Chauffeurs, & Helpers U. v. Blue Cab Co.*, 353 F.2d 687 (7th Cir. 1965); and *Local U. No. 483 Int. Bro. of Boilermakers, etc. v. Shell Oil Co.*, 369 F.2d 526 (7th Cir. 1966). Petitioner's reliance upon the above-cited Seventh and Ninth Circuit decisions is misplaced. In all of these cases, the Courts found the contract language to be ambiguous, thus marking a clear distinction between those cases and the present case.

In the *Forest Industries* case, *supra*, the Ninth Circuit determined that the contract was ambiguous with respect to the question of what constituted a "grievance". The Ninth Circuit interpreted *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) " . . . . to the effect that

a liberal and broad construction should be given to the term 'grievance' in the interest of encouraging the use of machinery which the parties themselves have set up for the peaceful settlement of disputes." 381 F.2d 144, at 146. It is significant to note that the dispute involved in the present case is not even subject to arbitration, without Petitioner's consent, which Petitioner has refused.

In the *Pacific Northwest Bell Tel. Co.*, case, *supra*, the Ninth Circuit expressly found that the meaning of the contract was not plain in the following language:

> "It simply cannot be said that as to the arbitrability of disciplinary suspensions the contract's meaning is plain when the fact is that the contract is silent." 310 F.2d 244, at 247.

Moreover, the Second Circuit in *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. General Electric Co.*, 332 F.2d 485 (2nd Cir. 1964), cert. den. 379 U.S. 928 (1964), had this to say about the holding in *Pacific Northwest Bell Tel. Co., supra*:

> "Neither of the two Ninth Circuit cases the company relies upon in its brief constitutes authority for the broad use of bargaining history which the company would have us undertake." 332 F.2d 485, at 490.

The same common thread of contractual ambiguity as was present in the Ninth Circuit cases also runs through the decisions of the Seventh Circuit. In *Independent Petroleum Workers v. American Oil Co., supra*, the question presented was whether the parties had obligated themselves by contract to submit a grievance to arbitration. The Court did not consider bargaining history until it first determined that the contract contained no express provision requiring arbitration of the disputed grievance.

The Seventh Circuit held in *Local U. No. 483 Int. Bro. of Boilermakers, etc. v. Shell Oil Co., supra*, that the disputed claim, involving contracting out of work, was not "on its face" covered

by the rather narrow wording of the contract, and affirmed the lower court's decision that a party cannot be compelled to arbitrate a grievance when the parties have not agreed to arbitration of such a grievance.

The Court's holding in *General Teamsters, Chauffeurs, & Helpers U. v. Blue Cab Co., supra,* was that the disputes in that case were subject to the application of the broad arbitration clause there involved, and the Court affirmed the lower court's order to arbitrate. The reference to past practices and prior bargaining history was mere dictum in the case.

Petitioner would minimize the effect of the earlier Seventh Circuit decision in *Anson v. Hiram Walker & Sons, Inc.*, 222 F.2d 100 (7th Cir. 1955) cert. den. 350 U.S. 840 (1955) rehearing den. 248 F.2d 380 (7th Cir. 1957), but *Anson* has not been overruled, and it is still the law in the Seventh Circuit.

Petitioner has completely misinterpreted the Second Circuit case, *International Union of Electrical, Radio and Machine Workers, AFL-CIO v. General Electric Co., supra.* Petitioner states on page 12 of the Petition that the Second Circuit " . . . . simply held that a court will not consider bargaining history where it touches upon both the questions of arbitrability and the merits of a dispute." This statement completely ignores the view of the Second Circuit as stated in footnote 5 of the Opinion. 332 F.2d 485, at 490:

> "Since bargaining history would appear to be a proper device for interpreting a contractual provision *only when that provision is ambiguous or otherwise unclear* and since an exclusionary clause to be effective must be clear and unambiguous, one might properly question the use of any bargaining history to indicate that a clause in a bargaining contract has been designed to exclude a certain type of grievance from arbitration." (emphasis added)

This case does not present a conflict with the decision of another court of appeals on the same matter, and the decision

in this case is firmly grounded upon decisions of the Second, Fifth, and Seventh Circuits cited in the Sixth Circuit's Decision. Moreover, it is well supported by an earlier Sixth Circuit decision. *Tennessee Consolidated Coal Co. v. United Mine Workers of America*, 416 F.2d 1192 (6th Cir. 1969), cert. den., 397 U.S. 964 (1970).

2.

The Decision in this case is not in conflict with applicable decisions of this Court.

The Sixth Circuit did not decide a federal question in a way in conflict with applicable decisions of this Court. Petitioner only cites two decisions of this Court in support of its contention that this Court should grant certiorari, based upon conflict with applicable Supreme Court decisions. *T.-C.E. Union v. Union Pacific R. Co.*, 385 U.S. 157 (1966), rehearing denied 385 U.S. 1032 and *Drake Bakeries v. Local 50*, 370 U.S. 254 (1962). These decisions are clearly not applicable to the present case.

T.-C.E. Union v. Union Pacific R. Co., supra, involved a jurisdictional-type dispute over the assignment of work by the Union Pacific to the Railway Clerks, rather than to the Telegraphers. Certiorari was granted "in order to settle doubts about whether the Adjustment Board must exercise its exclusive jurisdiction to settle disputes like this in a single proceeding with all disputant unions present." 17 L.Ed. 2d 264, at 268. The rationale of the Court's decision was that, since the dispute involved the claims of two competing unions, the Railroad Adjustment Board should have given both unions the opportunity to appear and present their respective cases and that the Board should have gone beyond the single collective bargaining agreement of the complaining union and considered the agreements of all unions involved in the overall dispute.

Drake Bakeries v. Local 50, supra, is equally inapposite. In *Drake Bakeries,* the Court affirmed the lower court's decision that an employer's damage suit for breach of a no-strike clause in a collective bargaining agreement should be stayed pending completion of arbitration. The Court's decision was based upon the broad language of the grievance and arbitration provisions of the contract and the reasoning that if the parties had intended to exclude strikes in breach of contract from the arbitration provision, they would have used express language to do so.

3.

The Sixth Circuit correctly decided what evidence cannot be considered in interpreting the collective bargaining agreement involved in this case.

Respondent would agree that promotion of industrial peace is certainly a prime consideration in formulating substantative law under § 301. That is why this Court encouraged the use of arbitration as a means of promoting industrial peace in *United Steel Workers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). However, Petitioner's pious sounding proclamations in support of industrial peace lose most of their meaning when stacked up with Petitioner's adamant refusal to submit this non-arbitrable dispute to voluntary arbitration.

Respondent does not seek to "dot every i and cross every t" but rather seeks to obtain damages on behalf of its members resulting from the Company's violation of the clear and unambiguous contractual language of the collective bargaining agreement.

From a policy standpoint, if the parties to collective bargaining agreements are permitted to use extrinsic evidence to show the meaning of contract language which is clear and unambiguous on its face, there would be no end to disputes and differences between the parties. Surely, this would not serve to

promote industrial peace, particularly when the employer can refuse to submit the dispute to arbitration, as did the employer in the present case.

4.

The proper approach to the interpretation of collective bargaining agreements depends upon the particular contract language in question.

The Sixth Circuit determined in this case that the clause of the contract in question is clear and unambiguous in its meaning, and followed precedents of the Sixth Circuit and other Circuits that:

> "Only when the Court has determined that the contract is ambiguous is a construction of the clause necessary. After a finding of ambiguity has been made, 'evidence of the surrounding circumstances and the practical construction of the parties is admissible to aid in its interpretation.' " 471 F.2d 751, at 757.

The distinction between the scope of judicial inquiry with regard to particular contract clauses was emphasized in the concurring opinion in the *Steelworkers Triolgy. United Steelworkers of America v. American Manufacturing Company; United Steelworkers of America v. Warrior and Gulf Navigation Company; United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 569. It was pointed out by Associate Justices Brennan and Harlan that the arbitration clauses in *American* and *Warrior* were quite different. In *American* the arbitration clause was the "standard" form that provides for the arbitration of "any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of this agreement. . . ". On the other hand, in *Warrior*, the arbitration clause excluded from arbitration

"matters which are strictly a function of management." As stated by Mr. Justice Brennan:

> "Because the arbitration promise is different, the scope of the court's inquiry may be broader." 363 U.S. 569, 570.

Petitioners reliance upon *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F. 2d 1123 (3rd Cir. 1969) is misplaced. There the Third Circuit was faced with the question of whether an arbitrator had exceeded his authority in the interpretation of the collective bargaining agreement. The Court held that the award was not contrary to any rational interpretation of the collective bargaining agreement and that the lower court's interference with the award was not proper.

Langer v. Iowa Beef Packers, Inc., 420 F.2d 365 (8th Cir. 1970) relied upon by Petitioner, supports Respondent's position. In *Langer*, the Court enunciated the following rule of contract interpretation:

> "Contract interpretation is generally a matter of law, while the intent of the parties is generally a question of fact. But where no extrinsic evidence is necessary to determine the intent of the parties, and where the intent is implied from the agreement and from its context, the legal effect of the agreement is properly resolved by the courts as a matter of law". 420 F.2d 365, 367-368.

5.

The Sixth Circuit decision correctly disposed of the jury trial issue and is not in conflict with applicable decisions of this Court.

Petitioner contends that the Sixth Circuit decided the question of the Union's entitlement to a jury trial on the merits in the mandamus proceeding, and, thus, the Court was precluded from considering the jury trial question on appeal.

The obvious fallacy of Petitioner's argument is that it begs the questions of exactly what the merits of the jury trial question were and when the Sixth Circuit dealt with the actual merits of the question.

In dealing with the jury trial issue on appeal, the Sixth Circuit acknowledged the holding of *Parissi v. Foley*, 203 F.2d 454 (2d Cir. 1953), rev'd on other grounds, 349 U.S. 46 (1955), that " . . . a judge can, within his discretion, permit a party to amend his complaint only on the condition that a timely demand for a jury trial be stricken from the amended complaint." 471 F.2d 751, at 755; however, the Court went on to state that the question before the Court and the answer to that question were:

> "The question, then, is whether the circumstances in this case warranted such a condition. We think they did not."

Thus, the merits of this question involved whether the circumstances in this particular case warranted the District Court's exercise of discretion in permitting the union to amend its complaint only on the condition that a timely demand for a jury trial be stricken from the amended complaint.

The second question, then, is when the Sixth Circuit considered the merits of the case for the first time. Certainly, it is clear that the Sixth Circuit did not in the mandamus proceeding undertake a thorough analysis of the facts relative to whether the District Court's exercise of discretion was warranted. Obviously, the Sixth Circuit took the position in the mandamus proceeding as is stated in its decision on appeal that " . . . . mandamus will not be used to review an interlocutory order except in extreme and exceptional cases. *Black v. Boyd*, 248 F.2d 156 (6th Cir. 1967), modified, 6th Cir., 249 F.2d 441." Plainly, the Court of Appeals felt that the mandamus proceeding between these parties was not such an extreme and exceptional case as would require the Court to use the drastic remedy of mandamus, and that the merits of the case could be fully con-

sidered by the Court upon appeal of the whole case. It was not until its decision on the entire case that the Sixth Circuit for the first time considered and decided the merits of whether the circumstances warranted the exercise of judicial discretion in permitting the amendment of the complaint upon condition that a timely demand for jury trial be stricken from the amended complaint.

After a complete and comprehensive review of the facts, the Sixth Circuit concluded that:

> "Accordingly, we find that the circumstances present in this case were not of the exceptional nature required to permit the attachment to the amended complaint the condition that the new issue would not be tried to a jury." 471 F.2d 751, at 756.

The Sixth Circuit's action on the jury trial issue is in accord with *In re Previn*, 204 F.2d 471 (1st Cir. 1953) where it was held that the matter of whether a trial court abused its discretion in not allowing a jury trial demand should properly be settled when and if the case came on appeal from a final judgment.

Angel v. Bullington, 330 U.S. 183 and *Brownell v. Chase Nat. Bank*, 352 U.S. 36, 39 (1956), cited on page 24 of the Petition herein are not applicable. In those cases, this Court held that once a dispute has been litigated, a later action cannot be maintained in a different forum.

CONCLUSION

The Sixth Circuit correctly determined that the clause of the collective bargaining agreement is clear and unambiguous and that, therefore, evidence of negotiation sessions and past practices was inadmissible to interpret the meaning of the clause. This determination is not in conflict with the decisions of another court of appeals on the same matter, nor is the Sixth Circuit decision in conflict with applicable decisions of this Court.

The Court of Appeals correctly decided the jury trial issue. There is no conflict between the Sixth Circuit decision on this matter and applicable decisions of this Court.

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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